

Chapter 7: NPS Moves to Curtail Commercial Fishing in Glacier Bay

Superintendent Marvin Jensen's Initiative

Marvin Jensen transferred from Sequoia N.P. to become superintendent of Kenai Fjords N.P., where he spent less than a year before accepting the position of superintendent at Glacier Bay N.P (see Figure 29). His arrival at Glacier Bay in January of 1988 was completely unceremonious. Often on such occasions the new superintendent is formally installed by the Service's regional director. Marvin Jensen pretty much showed up at Bartlett Cove and went to work. He had been given no marching orders by the Park Service, and felt he no immediate pressure from Alaska's congressional delegation or governor. His chief ranger, Dave Spirtes, who had been at Glacier Bay less than a year, helped apprise him of current and potential issues. High on the list was the need to complete the park's vessel management plan, and doing so became Jensen's first priority. 451

In the months prior to Jensen's arrival, Tollefson and his staff had been finishing up on what seemed to be a Congressional second bite at the apple. In addition to designating wilderness in Alaska parks and withdrawing lands for new or expanded national park service units in Alaska, ANILCA required the NPS to evaluate all remaining non-wilderness lands in Alaska's parks for their suitability for wilderness designation, and to make recommendations to Congress. To reflect "public interests and management needs," the NPS at Glacier Bay expanded the effort to include an evaluation of the suitability of the wilderness areas already designated by ANILCA. 453

The effort was mostly perfunctory, as few thought Congress would actually be willing to re-open the landmark environmental legislation. To national environmental organizations in particular, ANILCA had become almost sacred, and not to be tampered with.

In April 1988, the NPS published its Glacier Bay wilderness recommendation draft environmental impact statement (DEIS). The work—actually completed under Tollefson—was a classic land use planning exercise that attempted to classify lands according to their "highest use." Of the four alternatives presented, only one, the "No Action" alternative, did not recommend the deletion of the Beardslee Islands from wilderness status. 454 One of the

primary reasons for the recommended deletion of the Beardslee Islands was an NPS desire to accommodate ongoing commercial fishing activity. The final environmental impact statement (FEIS) was released in September. In it the NPS's proposed action recommended deleting the Beardslee Islands from wilderness status while establishing new wilderness areas in Muir Inlet above Sealers Island and in Wachusett Inlet.

In the fall of 1988, Spirtes briefed Jensen regarding the commercial fishing that was occurring in the park—some in waters designated as wilderness—and explained how NPS regulations that he believed broadly prohibited commercial fishing had not been enforced. Jensen considered commercial fishing inappropriate for a national park, particularly in wilderness, and wanted to get the issue resolved. He thought this could be done administratively, and attempting to do so ranked second on his list of priorities. He knew it would take time and a lot of work, but probably underestimated the complexity of the issue and the controversy engendered by it. Nevertheless, Jensen can be credited as the first Glacier Bay superintendent to comprehensively address the commercial fishing issue.

The nearby wilderness waters of the Beardslee Islands, where the NPS had legal leverage under the Wilderness Act, was a reasonable place to start. Jensen enjoyed rowing and kayaking in the Beardslees, and he was of the firm opinion that commercial fishing was not an appropriate activity in them. He felt no need to compromise on the issue. In November he recommended to regional director Boyd Evison that Beardslee Entrance be deleted from wilderness, but that the inner Beardslee Islands be retained. This system of islands and waterways, he wrote, "is remarkably unique in its scenic beauty and opportunity for experiencing wilderness qualities for the novice kayaker or boater. It is an easily accessible wilderness waterway where one may take a wilderness trip in part of Glacier Bay without having to pay the cost of an upbay trip on one of the tour or charter boats or brave the more difficult waters of the main part of the bay."457 Beardslee Entrance, from which much of lower Glacier Bay and its vessel traffic could be seen,



Figure 29: Glacier Bay N.P. Superintendent Marvin Jensen (courtesy Marvin Jensen)

was considered less valuable as wilderness. 458 As Jensen knew well, the retention of the Beardslees' wilderness designation would likely result in the termination of the locally important Dungeness crab fishery.

Jensen's letter was well received, and the following month William Penn Mott, director of the National Park Service, sent a proposed alternative modified in accord with Jensen's recommendation to the Secretary of the Interior's office. As with previous efforts to modify wilderness boundaries in Glacier Bay, no action was taken.

With his comments on wilderness boundary changes, Mott included Jensen's thoughts on the direction the NPS should take on the issue of commercial fishing in Glacier Bay: "We must operate on the premise that the long-term direction of this agency will be to ultimately eliminate commercial fishing ... In the short term, we should find a reasonable way to allow those who are currently commercially fishing the waters of Glacier Bay be allowed to continue, but only for a definite specified period of time and that no new fishing or fishermen

should be allowed to start." For Glacier Bay's designated wilderness waters, Mott thought that commercial fishing could be allowed to continue for a period not to exceed twenty years. If necessary, however, he was willing to compromise and allow fishermen who had been fishing in Glacier Bay's wilderness waters since the passage of ANILCA to continue for the remainder of their lives. Mott acknowledged that his time frame was somewhat subjective, but reasoned that it allowed for present uses to continue without opening the door to those who had fished in Glacier Bay's wilderness waters in the past but had moved on. 459 For Jensen, Mott's support was a signal to proceed.

In January 1989, George H. W. Bush succeeded Ronald Reagan as U.S. president. Like Reagan, Bush was a Republican; unlike Reagan, Bush was a moderate on the environment, a fact that may have encouraged the NPS to forge ahead.

With the support of Jensen, Spirtes actively pursued ways to address the commercial fishing issue. In a June 1989 staff briefing at Bartlett Cove, Spirtes raised more than 20 questions relating to the activity. Among them was the question of NPS jurisdiction over marine waters and the appropriate role of rangers in enforcing commercial fishing regulations. He questioned the appropriateness of commercial fishing in wilderness as well as nonwilderness waters of Glacier Bay N.P., its effect on the natural ecosystem and park visitors, the use of the Bartlett Cove dock and park road by commercial fishing interests, and whether it was a conflict of interest for NPS employees to fish commercially in Glacier Bay. PPP And he pondered how commercial fishermen might be bought out.460

Marvin Jensen and Dave Spirtes decided to elevate the profile of the commercial fishing issue. They directed Ranger Mike Sharp to expand the commercial fisheries monitoring program in Glacier Bay and, perhaps more important, to establish the NPS's first program to enforce ADF&G regulations in the Bay. The NPS's authority to

PPP A long-standing personnel regulation prohibits an NPS employee from engaging in any commercial business in a park in which he is employed. The NPS at Glacier Bay determined that commercial fishing in Glacier Bay by an NPS employee, permanent or seasonal, was a conflict of interest. Leon Snyder, who worked in the maintenance division at Glacier Bay and trolled from the vessel *Idle Hour*, was told to choose between commercial fishing in Glacier Bay and his position with the NPS. Snyder chose the former. Sharon Waguespack, an NPS employee whose husband, Dean, had fished commercially part time for a number of years, including in Glacier Bay, was told that it was a conflict of interest for spouses of NPS employees to fish commercially in Glacier Bay.

enforce the regulations was not in question; as had become customary, those relevant to Glacier Bay N.P. had been assimilated into the Code of Federal Regulations.

Sharp designed the enforcement program, which was focused almost completely on the Dungeness crab and halibut fisheries, in consultation with Howard Starboard, the ADF&G enforcement officer stationed at Hoonah. In 1989, NPS rangers began boarding commercial fishing vessels to check documents, examine gear, and measure fish. When boarding vessels, the rangers adhered strictly to procedures established by ADF&G enforcement officers. Vessels were boarded only when it was convenient for fishermen, not, for instance, when they were in the process of setting or hauling halibut gear. Additionally, rangers hauled crab pots (at first by hand, later with a hydraulic puller) to check the gear's compliance with ADF&G regulations. Mike Sharp recalled that few violations were encountered and very few citations were issued. Nevertheless, it was not unexpected that the boarding/ enforcement program—effectively an assertion of the NPS's authority over Glacier Bay's fisheries—increased the tension between commercial fishermen and the NPS.461

In July 1989, the NPS produced a draft briefing statement that outlined four possible courses of action regarding commercial fishing in Glacier Bay: (1) enforce current regulations [including the 1983 regulation that prohibited commercial fishing in national parks except where specifically authorized under federal statutory law; the prohibition on unauthorized commercial enterprises within the park; and the prohibition of commercial fishing in designated wilderness areas.] The enforcement of these regulations would cause an immediate closure of commercial fishing in Glacier Bay N.P.; (2) work to amend ANILCA to allow commercial fishing; (3) continue to not enforce commercial fishing regulations; and, (4) develop a phase-out regulation. The NPS dismissed the first option, the enforcement of current regulations, because it was thought that the furor that would erupt would compromise community relations, and possibly cause a "political maelstrom" that would result in legislation to legalize commercial fishing in the park. Within the context of an immediate closure, however, the agency indicated that it would be willing to consider the compensation of displaced fishermen. The second

option, amending ANILCA, was thought to lack popular support. Option 3, the continued non-enforcement of commercial fishing regulations, was deemed unacceptable from a legal and policy perspective. Option 4, a phase-out of commercial fishing in Glacier Bay National Park over a scheduled period of time, became the preferred course of action. 462 Perhaps as a bargaining chip, however, the threat of an immediate closure remained: "We have determined to take no legal action for this year against those who engage in ... commercial fishing activities in order to avoid confrontation and give us time to evaluate the situation," Jensen wrote in an August 1989 letter to the Southeast Alaska Conservation Council. 463 Jensen had some experience with immediate closures of established uses in other parks, and personally believed that some sort of phase out would be best.464

To garner support for the phase out of commercial fishing in Glacier Bay, the NPS raised the issues of conservation and overfishing, and made what is probably the first agency mention of the concept of Glacier Bay as a marine sanctuary. A draft briefing statement written in July 1989 stated that "To compromise the unique marine resources of Glacier Bay National Park by permitting commercial fishing would be a tragic loss of a true marine sanctuary," and added that "The lack of effort to eliminate or control commercial fishing enterprises within the park has resulted in an expansion of fishing pressure which may have severely depleted some fishery resources in some habitats."465 The claim was qualified the following month in an official briefing statement: "resource damage has not been proven."466

The NPS also began courting the State of Alaska. In August 1989, the Service provided a summary document, "Commercial and Subsistence Fisheries Management in Glacier Bay," to the state, and expressed a desire to pursue cooperative management and research programs. As it had been doing for a decade, the NPS proposed again that ADF&G adopt a statistical reporting area that encompassed only Glacier Bay. 467 Such was never to be the case, because the State of Alaska was very much opposed to the closure of Glacier Bay N.P. to commercial fishing and was working to hinder the NPS effort. The same request was made to the National Marine Fisheries Service (NMFS) regarding halibut. NMFS agreed, and in 1992

a statistical reporting sub-area (184) was established for Glacier Bay proper.⁴⁶⁸

Some of the shareholders of the Sealaska Corp., Southeast Alaska's regional Native corporation, had longstanding cultural and economic interests in Glacier Bay. Robert Loescher, a Sitka Native with clan ties to Glacier Bay, and big supporter of Senator Frank Murkowski, was the corporation's president. QQQ In October 1989, Jensen drew a line in the sand when he sent Loescher a letter stating that "Since there is no federal statutory law that allows commercial fishing within the boundaries of Glacier Bay National Park, commercial fishing is prohibited within the park."469 Jensen added that details implementing the commercial fishing prohibition had not yet been developed. Such a prohibition would have an impact on a number of Sealaska shareholders, particularly the commercial fishermen in Hoonah, many of whom fished in Glacier Bay N.P. Not long after receiving Jensen's letter, Sealaska introduced the first conceptual draft of federal legislation designed to "fix" the Glacier Bay problem. Though little noticed at the time, it may have been the basis of legislation introduced by Senator Murkowski the following year. 470

Jensen saw the commercial fishing issue as black and white. His early approach to the region's Native people, many of whom were represented by Sealaska, lacked the sensitivity that at least some in the NPS were working to cultivate, and his approach was ultimately counterproductive. Rather than trying to accommodate them (to the extent legally possible) as a people with longstanding and very deep cultural ties to Glacier Bay, a people whose rights in their ancestral homeland were incrementally being eroded, Jensen appeared to view the region's Natives simply as another special interest group whose use of the park for commercial fishing (and other traditional activities) was at odds with park purposes and values. 471 Jensen apparently did acknowledge that when the monument was established, unidentified "government men" had likely

assured local Natives that they would always be welcome at Glacier Bay. 472 But things had changed, and his initial approach toward the region's Natives substantially soured the NPS's often touchy relationship with the Native people, particularly those in Hoonah. RRR 473 Realizing his error, Jensen eventually laid the groundwork to mend the NPS's relationship with the people of Hoonah. However, as a committed advocate of restrictions that were resented by a people whose culture and economy were intricately tied to the sea, any expression of understanding on his part was discounted. SSS 474 It was not until after Jim Brady succeeded him as superintendent that a substantial element of respect and workability was brought back into the relationship.

In their contention that current regulations prohibited commercial fishing in Glacier Bay N.P., Jensen and Spirtes were on less than solid ground. And they knew it. A January 22, 1990 memorandum on fishing issues in Glacier Bay N.P. prepared at the Park Service's Alaska regional office cited DOI solicitor J. Roy Spradley's 1983 opinion that commercial fishing was permitted in the non-wilderness waters of Glacier Bay N.P.475 Spradley's opinion, however, did not curb Spirtes and Jensen's enthusiasm for terminating commercial fishing in Glacier Bay. Based on their own reading of relevant legislation and existing regulations, they concluded that Spradley's opinion was flawed. 476 A similar belief seems to have prevailed in the NPS hierarchy as well, for the Service continued its refrain that commercial fishing in Glacier Bay was illegal and a direct contradiction with the agency's statutorily mandated duties to preserve Glacier Bay's marine ecosystem.

Glacier Bay N.P. was not the only unit in the national park system in which a commercial fishing took place. Legal provision existed for commercial fishing in 34 units of the national park system. The legal rationales for the allowances varied and were not always the same. They included the recognition of

QQQ Loescher is a member of the Chookaneidi clan, the people of Glacier Bay. The for-profit Sealaska Corporation was authorized under the Alaska Native Claims Settlement Act (1971), and has some 17,300 shareholders.

RRR Tomie Lee, who became superintendent of Glacier Bay N.P. in 1998, wrote in 2000 that the relationship between the NPS and the Hoonah Tlingits in earlier years had been "badly broken, and that federal government and park service actions or inactions were responsible for that situation," and added that at the time of the writing there were "sincere efforts to build bridges and heal wounds."

sss Privately Jensen did reach out. The author was a guest at a breakfast held in honor of Hoonah Tlingit elders George and Jesse Dalton that Jensen and his wife, Mary Lynn, hosted in their home. The affair was very pleasant for all present.

colonial law (Acadia N.P.), Native American treaty law (Olympic N.P.), and provisions in enabling legislation (Assateague Island National Seashore). In Alaska, the Alaska National Interest Lands Conservation Act (ANILCA) specifically authorized commercial fishing activities at Cape Krusenstern National Monument, the Malaspina Glacier Forelands of Wrangell-Saint Elias National Preserve, as well as in the Dry Bay area of Glacier Bay National Preserve.

In January 1990, the NPS determined that commercial fishing in Glacier Bay N.P. was a "consumptive use that may be having a significant effect on park resources and values and is inconsistent with the mission of the NPS to conserve and protect the resources unimpaired for present and future generations."478 A contemporaneous NPS or DOI memorandum (possibly a draft) that reviewed the legal and regulatory issues related to potential restrictions on commercial fishing in Glacier Bay N.P. naively advised that the NPS take "immediate steps to prohibit all commercial fishing in designated wilderness waters." The memorandum added that a courtesy public notice of the prohibition might be advisable. 479

Jensen and the NPS knew that any restrictions that would unduly disrupt traditional fishing practices would generate fierce opposition from commercial fishing interests, the State of Alaska, and others. Nevertheless, a course was chosen and set in motion—to "initiate studies of the extent and effects of commercial fishing and establish a program with the long range goal of ultimately eliminating this use"—that ignited what was certainly one of the largest challenges ever faced by the National Park Service in Alaska. 480

Jensen had little precedent to draw on, but in his endeavor retained support at the highest levels in the NPS. In February 1990, James Ridenour, the new director of the NPS, reiterated his agency's legal responsibility to enforce regulations that prohibited commercial fishing. He also, however, expressed a willingness to support compromise legislation that might settle the issue. Quoting Ridenour: "we do agree to consider supporting legislation that could allow commercial and subsistence fishing in marine waters of Glacier Bay. This would need to be based on sound scientific data demonstrating the biological and environmental compatibility of these activities with

the purposes of the park."⁴⁸¹ Ridenour had met in January with congressional staff and representatives of Alaska's governor's office, and had agreed to help U.S. Senator Ted Stevens craft a "housekeeping" amendment to ANILCA that would allow commercial fishing "subject to some constraints."⁴⁸²

Though the NPS hierarchy might have been willing to accept a legislative fix to the issue, the staff at Glacier Bay proceeded with the regulatory process. At a public meeting in Juneau, likely in February or very early March of 1990, the NPS formally announced its intention to phase commercial fishing out of Glacier Bay. As was expected, this caused substantial concern among commercial fishermen. 483

On March 7, NPS officials, including regional director Boyd Evison, privately met with ADF&G officials. For a short while, at least, the NPS seems to have lost its desire for a bold initiative in Glacier Bay, because at this meeting Evison and his group proposed an alternative to a phase-out of commercial fishing in Glacier Bay. Their proposal was to initiate a comprehensive research program to determine what effect commercial fishing had on the resources and other uses of the park. The research program would last for approximately seven years, and during that time status quo commercial fishing would be allowed to continue, including in designated wilderness waters. At the end of the study period the NPS would analyze the information and determine what direction it would take concerning the continuation of commercial fishing.⁴⁸⁴ The proposal, which was apparently never put into writing, seems to have evaporated into thin air.

Meanwhile, rumors spread through the region of an imminent closure of Glacier Bay to commercial fishing, so as a result, area residents and fishermen quickly contacted the Citizens' Advisory Committee on Federal Areas (CACFA), a state-sponsored group. 485 Among its duties, the CACFA was chartered to report to the legislature and the governor on the impact of federal regulations and federal management decisions on Alaskans. 486 The organization reacted immediately. To assess public opinion on the possible closures and to discuss alternatives that might resolve the issue, CACFA in March 1990 held meetings in five Southeast Alaska communities (Gustavus, Hoonah, Juneau, Pelican, and Yakutat). 487 Testimony at every meeting strongly supported the continuation of commercial fishing in

Glacier Bay N.P.⁴⁸⁸ CACFA considered federal legislation that would specifically provide for the continuation of commercial fishing in Glacier Bay N.P. to offer the best long-term resolution of the issue.⁴⁸⁹

Some within the ranks of the NPS urged caution on the Glacier Bay issue. Ross Kavanagh, the Service's regional fisheries biologist, noted an "apparent increase in enthusiasm" among the Glacier Bay N.P. staff and regional office managers to phase out commercial fishing in Glacier Bay N.P. To counter that enthusiasm, he cautioned broadly that "just about every individual and institution who matters will be against the proposal, with solid justifications at hand." Kavanagh cautioned specifically that fisheries research in Glacier Bay "will likely provide little or no biological justification for a phase-out."490 There was, however, another way for the NPS to biologically justify a phase-out, which was to broaden the issue by citing worldwide depletions of fish populations and stress the potential benefits of Glacier Bay as a marine sanctuary: if a national park could not be a marine sanctuary, then where? It was not until his last couple of years at Glacier Bay that Superintendent Jensen began making this point, primarily to NPS audiences and conservation groups. He was influenced to do so in part by Bill Brown, a semi-retired NPS historian who resided in Gustavus. In formal speeches Brown had been citing the need and importance of national parks as refugia for comparison over time with non-protected areas to help understand the effects that consumptive uses were having on ecosystems in general.491

It should be noted that the Exxon Valdez oil spill that occurred in Alaska's Prince William Sound in 1989 had some bearing on NPS efforts to protect Glacier Bay as a marine sanctuary. As a sanctuary, Glacier Bay could provide baseline data with which damage such as was done by the Exxon Valdez could be measured. The oil spill also raised public awareness of the need to protect marine environments.

In late April 1990, John Katz, of the Alaska governor's office in Washington, DC, submitted a letter to NPS Director Ridenour proposing legislation to settle the Glacier Bay issue. ⁴⁹² A short while later Alaska Governor Steve Cowper, Senators Ted Stevens and

Frank Murkowski, and Representative Don Young sent a joint letter to Alaskans. The politicians had concluded that the best way to resolve the uncertainty over commercial fishing (and subsistence) in Glacier Bay was through legislation that would be introduced by Senator Murkowski, who, among Alaska's delegation to Congress, generally took the lead on Glacier Bay issues. The legislation they proffered would allow commercial fishing in all areas of Glacier Bay at a level not significantly greater than that existing in 1989, and would authorize a cooperative study of up to seven years by state and federal agencies to determine the effects of commercial fishing on the resources of Glacier Bay. Commercial fishing would be allowed to continue until the study was complete, at which time the situation would be re-evaluated. 493 Ridenour reacted to the proposal by stating that "proper" legislation could "supplement the regulatory process." Ridenour pointed out that his agency had no administrative or regulatory power to allow commercial fishing in Glacier Bay's wilderness waters, and that it did not favor any legislative exceptions to the Wilderness Act that would permit it to do so. 494

It must be noted that in 1990 Alaska's entire delegation to Congress were members of the minority (Republican) party. Without support among the Democratic majority, any legislation they introduced stood little chance of becoming law. The fact that this legislation would conceivably alter some of what had been accomplished under ANILCA meant that it was likely to be strongly opposed by those who had worked so hard to pass the landmark conservation measure.

With potential legislation on the table, the NPS proceeded with the development of its regulations, and in May 1990, Boyd Evison, NPS Alaska regional director, wrote to Don Collinsworth, commissioner of ADF&G to inform him that the service was nearing a proposed regulatory solution. He requested a conference with Collinsworth and his staff to discuss the matter. Evison also requested that ADF&G acknowledge that wilderness waters in Glacier Bay were closed to commercial fishing, and asked that ADF&G's regulatory publications reflect those closures. 495 At that time, however, there was no way the State of Alaska was going to acknowledge NPS jurisdiction over any fisheries in Glacier Bay.

An important change in personnel at Glacier Bay occurred in the spring of 1990 when Dave Spirtes was succeeded as chief ranger by Randy King. By virtue of his temperament and abilities and fairly long tenure as chief ranger, King over time became the Service's lead person and strategist in Alaska on the Glacier Bay commercial fishing issue, serving under three superintendents. He was a somewhat reluctant occupant of this position. The fact that the NPS had tacitly approved commercial fishing in Glacier Bay N.P. for many years and had allowed the industry to develop caused him to question the fairness of the NPS's somewhat abrupt decision to terminate it. To his credit and to the NPS's and public's benefit, he did not try to bureaucratically finesse this controversial issue. Without compromising the values of the agency that employed him, King honestly tried to understand and accommodate the various interests. He later said the issue was the most difficult he ever faced in his NPS career. It was complex, there was a heavy workload, and a lot of emotion was involved. And those who would be affected weren't, in his words, "abstract concepts," but friends and neighbors. He nevertheless recognized his obligation to manage Glacier Bay as a national park that "belongs to the person in New Jersey as much as it does someone who lives here."496

In July 1990, after a conceptual review by ADF&G, the regulatory package was sent to the NPS Washington, DC office for review.⁴⁹⁷ That same month, however, Senator Murkowski was ready with a legislative solution—not yet made public—that was different than that proffered in the spring. The legislation drafted by Murkowski would amend ANILCA and "clarify the status of fishing activities in Glacier Bay National Park." The gist of his legislation was that commercial fishing—except for bottom trawling—would be permitted in the waters of Glacier Bay N.P., including areas designated as wilderness, but limited to an extent not significantly greater than the effort during 1989. 498 Some of the draft legislation's language was identical to that in material provided to the State of Alaska the previous July by Birch, Horton, Bittner and Cherot, a law firm that may have been retained by Sealaska. 499 The proposed legislation was reviewed by the Governor's Office and by ADF&G. (In an October letter to Robert Loescher of Sealaska, Governor Cowper said that his office had been

"working with" Senator Murkowski in drafting the legislation. 500) In mid-August 1990, seemingly unaware that legislation was being developed, the NPS wrote that it had the support of Alaska's congressional delegation for a proposal to implement the interim regulations authorizing continued commercial fishing in the park during a 7-year study period. 501 Two weeks later the NPS learned that Murkowski had a solution of his own, and the following month the agency described the senator's office as being "ready to roll." 502

The NPS, of course, did not favor Murkowski's legislation. Likewise, The Wilderness Society, headed by George Frampton, who would later become an Assistant Secretary of the Interior in the Clinton administration, and the National Parks and Conservation Association "strongly opposed" it. 503 Although Murkowski's legislation would guarantee access to Glacier Bay's fish, some fishermen found fault with it: the Alaska Trollers Association (ATA) did not want its production to be capped at the 1989 level. 504 Nevertheless, ATA thought that legislation "may well be our only hope of permanent resolution to the problem." 505

AWA v. Jensen

One interest group that was not waiting for Congressional legislation or for the NPS to deal with the commercial fishing issue administratively was the Alaska Wildlife Alliance (AWA). Founded by a group of Alaskans in 1978, the AWA, which The Wilderness Society called "a particularly militant conservation organization," described its mission as "the protection of Alaska's natural wildlife for its intrinsic value as well as for the benefit of present and future generations."506 The organization had a longstanding interest in Glacier Bay and had been frequently critical of the NPS's whale and fisheries management, and what it termed "acquiescence" to the cruise ship industry and park concessioners. The group believed that "protection of the wilderness and wildlife resources in the Bay outweigh the economic benefits derived from commercial fishing," and it maintained that commercial fishing should be phased out of Glacier Bay, at least during the summer. ⁵⁰⁷ On August 21, 1990, after years of disagreement with the NPS over aspects of its management of Glacier Bay N.P., the Alaska Wildlife Alliance, along with the group American Wildlands, filed a civil action lawsuit against the NPS in federal district court that

became known as *AWA v. Jensen.*⁵⁰⁸ Among their complaints was that the NPS had failed to bar commercial fishing activities in Glacier Bay N.P. The AWA's position was that there was a general statutory ban on commercial fishing in all national parks except those where the activity was specifically allowed by Congress.⁵⁰⁹ The NPS, however, was a defendant in the case, because despite considerable earlier talk by the NPS that commercial fishing was illegal in the non-wilderness waters of Glacier Bay N.P., the Department of Justice attorney who represented the NPS argued that the Secretary of the Interior had statutory discretion to allow commercial fishing in non-wilderness waters.⁵¹⁰

Management through litigation is not the bureaucratic ideal, and the NPS did not officially welcome the lawsuit. Privately, however, many in the NPS welcomed it as a means to accomplish much of what the agency was preparing to do administratively, but with more finality and without the compromises and ill-feeling that a contentious public rulemaking process might engender.

Senator Murkowski called AWA v. Jensen "a lawsuit filed by radical groups with no conception of the human realities involved."511 Various Alaska state legislative leaders, moreover, considered the lawsuit to have "disastrous ramifications for the livelihood and lifestyles of people in northern Southeast Alaska."512 The State of Alaska, however, chose not to intervene in AWA v. Jensen. Among its reasons was the perceived difficulty of succeeding on state claims, and the likelihood that the state's participation would elevate the lawsuit's profile and bring in additional "adverse" parties (such as national environmental groups). A high national profile for the Glacier Bay commercial fishing issue would also diminish the chances of success in the Congress, where the state was concentrating its efforts.⁵¹³

Likely in part to ward off the lawsuit, the NPS at Bartlett Cove had drafted—and the regional office had approved—proposed regulations that would immediately terminate commercial fishing in Glacier Bay N.P. wilderness waters, and provide for a 7-year exemption for commercial fishing in Glacier Bay N.P. non-wilderness waters. The 7-year exemption was justified because past NPS policies had allowed commercial fisheries to develop, and seven years was thought to be enough time for commercial fishermen to make a transition to waters outside the park. (In 1999 NPS had

implemented regulations in the Everglades that allowed fishermen seven years to amortize their equipment.) It was a phase-out period that would result in the termination of all commercial fishing in Glacier Bay N.P., unless planned but unspecified studies during the exemption period arrived at the unlikely conclusion that commercial fishing had little effect on Glacier Bay N.P. resources. In its cursory economic analysis of the draft proposed rule, the NPS naively determined that the economic effects of the rulemaking would be "negligible." 514

The NPS regulatory process was grinding forward, legislation had been written though not introduced, and now a lawsuit had been thrown into the mix. It seemed that the odds had increased that some sort of change in the management of commercial fishing in Glacier Bay N.P. would occur sooner rather than later. As things were, change was coming from the top down: the voice of Southeast Alaskans, particularly those in the communities near Glacier Bay, had, as yet, been largely left out of the equation. Many in the region wanted to make certain their concerns were known, and to at least help steer the regulatory and legislative efforts.

Organized Resistance, More Legislation

To specifically address the Glacier Bay commercial fishing issue, in October 1990 a number of Southeast Alaska fishermen, fishing groups, and processors, along with the City of Pelican, formed the Allied Fishermen of Southeast Alaska (AFSA). Led by Juneau attorney Bruce Weyhrauch and the Alaska Trollers Association's (ATA) president Dale Kelly, AFSA's primary goal was to "ensure the continued health of the commercial fisheries in GBNP waters by working with all concerned groups to resolve present conflicts." The group sought consensus "with all groups in the region in order to approach Congress with a unified, reasoned amendment to ANILCA."515 AFSA later determined that Congressional legislation was the only avenue that would ensure the continuation of commercial fishing in Glacier Bay N.P.516 Among its activities, AFSA lobbied in Washington, DC and intervened in AWA v. Jensen on behalf of the NPS. In a 1992 attempt to raise money to fight the Glacier Bay closures, the group invited singer Billy Joel and movie star Kevin Costner to Juneau to do a benefit performance. Joel and Costner were thought to be sympathetic to the plight of commercial fishermen, but neither accepted.517

In December 1990, Walter Hickel succeeded Steve Cowper as Alaska's governor. Hickel had been governor during the late 1960s, and had served as Richard Nixon's Secretary of the Interior. He was a strong advocate—if not an ideologue—where state sovereignty was concerned, and he would certainly not cooperate with the NPS to close the fisheries of Glacier Bay.

The Southeast Alaska Conservation Council (SEACC), an established Southeast Alaska environmental group, continued to be involved in the Glacier Bay commercial fishing issue. At that time SEACC represented 13 conservation groups in 11 Southeast Alaska communities. A considerable number of its more than 1,000 members were fishermen. The organization prided itself on its knowledge of Southeast Alaska, its consensus-building skills, and its ability to work in the political arena.TTT Though SEACC was primarily focused on the region's forest issues, it had considerable experience with fishing issues, inasmuch as protection of salmon spawning streams was part of its agenda. The organization was neither for nor against commercial activity, but advocated for "conservation and the most appropriate use of lands consistent with their natural value."518 SEACC believed that there was a place for commercial fishermen in Glacier Bay N.P., and in late 1990, agreed to facilitate an unofficial ad hoc Glacier Bay Citizens' Caucus. SEACC's effort was clearly supported by Governor Cowper.⁵¹⁹

The group met at Hoonah on January 19-20, 1991. It consisted of commercial fishing interests, Native subsistence interests, a backcountry concessioner, a charter boat operator, a recreational boater, a representative of the cruise ship industry, one representative from each of the communities of Elfin Cove, Gustavus, Hoonah and Pelican, and a representative of Friends of Glacier Bay.⁵²⁰ SEACC facilitated, but did not participate in the caucus, and Marvin Jensen was present as an observer and to provide information. The goal of the group was to determine which aspects of the Glacier Bay issue offered the greatest likelihood of local consensus. This consensus could, in turn, become the basis for a legislative proposal.⁵²¹ Regarding commercial fishing, the group agreed that outer coast and Icy Strait waters should

remain open to commercial fishing "forever," with the understanding that some waters in Glacier Bay proper, which Jack Hession, of the Sierra Club, termed the "biological heart" of Glacier Bay N.P., would be protected as wilderness. "UUU 522 This compromise remained fundamental in the numerous public meetings on commercial fishing in Glacier Bay that were held over the next seven years, as well as the 1998 legislation that went a long way toward resolving the issue.

Compromise isn't always part of the process in Congress. On May 9, 1991 Senator Murkowski formally introduced S. 1624, "A bill to amend the Alaska National Interest Lands Conservation Act to improve the management of Glacier Bay National Park, and for other purposes." A provision of the proposed legislation would have allowed commercial fisheries that were in existence in Glacier Bay prior to 1989 to continue. 523 The legislation was a long shot that Murkowski hoped would swiftly resolve the issue in favor of commercial fishermen, in part by circumventing the lawsuit filed by the Alaska Wildlife Alliance.

In late summer, Murkowski introduced a refined version of the bill that would have permitted commercial fishing in all non-wilderness waters of Glacier Bay N.P., with the provisions that in Glacier Bay proper the average annual commercial fishing effort, by species, would be maintained at a level no greater than had existed during the years 1981 through 1991, and that only those types of commercial fishing gear in use between 1981 and the date of the legislation's enactment would be allowed.⁵²⁴

The response by the NPS to Murkowski's legislation was as one would expect: "NPS cannot support open-ended authorization of consumptive commercial resource extraction. Such presumably impairing activities contradict the Organic Act as interpreted by NPS Management Policies and NPS regulations. In addition, any authorization of such commercial activities in designated wilderness contradicts the Wilderness Act of 1964."525 At least one official at the Alaska Department of Fish and Game assumed that, should they choose to do so, national environmental organizations such as the Sierra Club could "torpedo" any Glacier Bay legislation they found disagreeable. 526

TTT SEACC was the primary force behind the Tongass Timber Reform Act (1990).

UUU Bill Brown, a Gustavus resident and former NPS historian who represented Friends of Glacier Bay at stakeholder meetings in the late 1990s, called Glacier Bay the "very heart and gut" of the park.

Congress took no action on S. 1624 until the following year.

In 1991 the NPS published its first comprehensive service-wide guideline on natural resource management. Commonly referred to simply as NPS-77, the Natural Resources Management Guideline was said to provide "the information necessary to design, implement, and evaluate a comprehensive natural resource management program," and was scheduled for regular formal updates.527 NPS-77 stated that marine resources represented a "significant component of NPS resource management responsibility," but acknowledged that "comparatively little is known about marine biota and ecology, physical and chemical processes, and topography." VVV 528 The document specifically clarified the agency's 1978 Management Policies Handbook that had simply stated that "Commercial fishing is permitted only where authorized by law," without stipulating whether the law be federal, state, or local. Under NPS-77, "Commercial fishing will be allowed only where specifically authorized by federal law or treaty right." The document, however, offered only broad guidance on fisheries management. Relevant to the situation at Glacier Bay was the statement: "Superintendents must not allow harvest to reduce the reproductive potential of the [fish] population or to radically alter its natural (unfished) age structure."529 Unfortunately, the document offered no standard as to exactly what might constitute a "radical" alteration of a fish population's age structure, which is by no means static, even under natural conditions. ADF&G regulations in Glacier Bay's king salmon, halibut, Tanner crab and Dungeness crab fisheries prohibit commercial fishermen from keeping fish or crab below a certain size. Certainly the age structure is being modified in each case, though the effect was probably insignificant for halibut and particularly king salmon. These harvesting patterns may have had an effect on Tanner crab, but the steady decrease in the size of legal male Dungeness crab was apparent to fishermen and processors. Increasingly, young crab that had just reached legal size were becoming the largest component of the Dungeness crab harvest. Was this a radical alteration of the population's age structure?

Was it due to the intensity of the commercial fishing effort? If it was, the NPS needed a rational basis to act, and a scientific effort to do so would take considerable time.

The 1991 Proposed Rule

On August 5, 1991 the NPS published its proposed Glacier Bay commercial fishing rule in the *Federal Register*. ⁵³⁰ The rule was characterized by the NPS as an "equitable solution to resolving contradictions among nationwide regulations and service policies, and regionally originated regulations and management plans" ⁵³¹ It would:

- Immediately terminate commercial fishing in all wilderness waters of Glacier Bay N.P.;
- 2. Phase out commercial fishing in non-wilderness waters of Glacier Bay N.P. over a 7-year period. During the 7-year period, studies would be undertaken to determine if "certain levels and/or types of commercial fishing can compatibly coexist with conserving park resources in an unimpaired state." 532 Should this be the case, the NPS might consider sanctioning closely-monitored commercial fisheries.

A subsequent NPS news release portrayed the proposed rule as "an exemption to a nationwide ban on commercial fishing."533 According to the NPS, the proposed rulemaking would not eliminate commercial fishing, because commercial fishing was already prohibited by statute in designated wilderness and by regulations in other areas.⁵³⁴ Regarding ongoing wilderness waters fisheries, the Service wrote that "relocation, and its possible economic effect is not a result of these proposed regulations but a result of the areas being within wilderness areas designated [by Congress] in 1980."535 The court's decision in AWA v. Jensen would bear this out. The legality of commercial fishing in non-wilderness waters, however, was another matter.

The NPS continued to maintain that the economic effects of its proposed rule would be negligible and asserted that the elimination of commercial fishing from designated wilderness waters "might have some minor economic effects." The agency also maintained that the 7-year exemption period would have a "positive" economic impact since, rather than

vvv As of this writing, the marine resources management section has not been updated.

terminating commercial fishing immediately, it accommodated commercial fishermen in making the transition to waters outside Glacier Bay N.P.⁵³⁷

The NPS guardedly played up the possible positive value to commercial fishermen of Glacier Bay N.P. as a marine reserve: as a result of the protection of nursery grounds, the NPS wrote, "commercial fisheries adjacent to the Park may improve for some species." This statement had little relevance in Glacier Bay proper because, of the commercial species under concern, it is a nursery ground only for Dungeness, Tanner and king crab, which in Southeast Alaska generally complete their life cycle close to where they are born.

Though it had come as no surprise to commercial fishing interests, the publication of the proposed rule had added to the urgency of the situation. The NPS at the highest level seemed almost surprised that the "commercial fishing community and their supporters were nearly unanimous in seeing the regulation as a closure rather than an exemption allowing continued fishing." 539

Predictably, Senator Murkowski denounced the proposed rule as yet another "interference from an Outside agenda with no understanding or sympathy for realities in Alaska," and Ron Somerville, deputy commissioner of ADF&G, characterized it as "the National Park Service-against-everybody-else syndrome."540 Somerville also threatened legal action against the NPS, saying, "Rather than wait seven years and see the fishing industry die a slow death, we'd rather see something happen now."541 Alaska Governor Walter Hickel added that "Alaskans who have made their living and fed their families by commercial and subsistence fishing in Glacier Bay should not be forced out of the park," and stated his support for Murkowski's legislation.⁵⁴²

In late September, Alaska Congressman Don Young introduced Glacier Bay legislation of his own. H.R. 3418, "A bill to regulate fishing and other maritime activities in certain waters of Alaska, and for other purposes," was very straightforward. It amended the Magnuson Fishery Conservation and Management Act to give the State of Alaska "jurisdiction and authority" over commercial fishing in Glacier Bay N.P., notwithstanding the wilderness provisions of ANILCA. 543 As written, the legislation was bold but doomed, more ideological sentiment than substance.

His course set, Marvin Jensen reviewed commercial fishing season schedules, consulted with representatives of the fishing industry, and determined that the last two weeks of September in 1991 would best accommodate the greatest public participation for meetings on the proposed rulemaking. 544 Meetings were scheduled in eight Southeast Alaska communities (Elfin Cove, Gustavus, Hoonah, Juneau, Ketchikan, Pelican, Sitka and Tenakee Springs), as well as Anchorage and Seattle. A 90-day comment period was established.

In all, some 323 timely written and oral comments were received. As well as from individuals, comments were received from ten Native organizations, nine conservation organizations, three state agencies and two local governments. Twelve comments were received from commercial fishing organizations that characterized the proposed rule as a "closure action." 545 Virtually all the individual commercial fishermen who commented stated that their activities had no effect on park resources or values, and a majority stated that visitors to Glacier Bay enjoyed seeing commercial fishing operations. In a summary of significant issues and points raised in the public comment period, the NPS subsistence office in Anchorage charged that commercial fishermen displayed "very little understanding that park resources include marine resources, and virtually no understanding that fish are park resources."546

Most commercial fishermen do understand good fisheries management. To their credit, commercial fishermen in Southeast Alaska are rarely heard to complain when the Alaska Department of Fish and Game (ADF&G) closes or restricts a fishery for conservation purposes. Fishermen viewed the proposed closure of Glacier Bay N.P. to commercial fishing by the NPS, however, as an arbitrary action that, at their expense, would "protect" a resource that, being well-managed by ADF&G, was not in need of protection.

The State of Alaska's response to the NPS was a 26-page letter by Paul Rusanowski, of the state's Division of Governmental Coordination. Rusanowski wrote that the state "totally and unequivocally" objected to the proposed regulations, which it called a "blatant attempt to seize the State of Alaska's regulatory jurisdiction over state lands and waters." Among the state's objections were:

- "The background information accompanying the proposed regulations specifically fails to recognize the state's title to the navigable waters and their beds and, significantly, the state's jurisdiction over the water columns, shorelands, tidelands, and submerged lands adjacent to the Glacier Bay National Park;"
- The information used to support the proposal was inaccurate and incomplete;
- The proclamations creating Glacier Bay N.M. in 1925 and expanding it in 1939 made no reference to marine waters.

The state also complained that the proposed rulemaking "grossly understate[d] the major social and economic impacts" on Alaska residents and communities, and was thus in violation of the National Environmental Policy Act (NEPA), which required the identification and consideration of socio-economic impacts in a proposed rulemaking.⁵⁴⁷

Similarly, the Citizens Advisory Committee on Federal Areas (CACFA) cited procedural matters in its comments, specifically charging that the NPS did not adhere to the statutory mandates of the Regulatory Flexibility Act, which required a description of the effects of the proposed rule on small entities.⁵⁴⁸

Bruce Weyhrauch, who had helped organize the Allied Fishermen of Southeast Alaska (AFSA) a year earlier, questioned the NPS on what information was used to determine the 7-year exemptive period. (Jensen said later that the NPS, with no precedent to draw from, considered seven years to be "doable and fair."⁵⁴⁹) Weyhrauch also brought up the possible effects of the rule on fishermen, including those who did not fish in Glacier Bay but who would suffer the ill effects of additional competition when those who fished in Glacier Bay were forced out.⁵⁵⁰

The Wilderness Society was disappointed with the proposed rule. The group considered commercial fishing to be illegal in Glacier Bay N.P., and recommended that the activity be prohibited immediately in wilderness waters and specifically phased out of the rest of the park by the end of 1997.⁵⁵¹

At least one individual fisherman chose to express his opposition to the proposed rule on a personal level. Superintendent Jensen recalled several in-your-face verbal confrontations with Tom Traibush on the dock at Bartlett Cove. 552

In Congress, Senator Murkowski continued to promote S. 1624, while in the House, Representative Young did the same with H.R. 3418.

Senator Murkowski's legislation was discussed and amended at a May 1992 hearing of the Senate Committee on Energy and Natural Resources, Subcommittee on Public Lands, National Parks. 553 As amended, the legislation authorized commercial fishing in the non-wilderness marine waters of Glacier Bay, but only by trolling, long lining or the use of pots or ring nets. Furthermore, the legislation prohibited the annual average commercial fishing effort for each species within nonwilderness marine waters of Glacier Bay proper from exceeding the average annual effort which existed for that species during the period between 1980 through 1991. It also authorized the Secretary of the Interior to develop a comprehensive multi-agency commercial fisheries research and monitoring program. As such, the legislation was approved and referred to the whole Senate.554

On June 9, 1992, the House Committee on Merchant Marine and Fisheries, Subcommittee on Fisheries and Wildlife Conservation and the Environment and the Subcommittee on Merchant Marine held a joint hearing on H.R. 3418. After listening to testimony from AFSA, Sealaska, the Sierra Club, NPS Director James Ridenour, and NOAA administrator William Fox, Congressman Young's legislation was amended to correspond to Senator Murkowski's S. 1624, and reported out of the full committee in early July.⁵⁵⁵ That same month the Alaska Commercial Fisherman reported that Alaska's lone congressman had "successfully negotiated compromise legislation with Park officials." In exchange for a ban on fishing in wilderness waters, fishermen would be guaranteed unrestricted access to Cross Sound and the outer coast waters of Glacier Bay N.P.556 There is no evidence of this compromise. In September 1992, a hearing was held by the House Committee on Interior and Insular Affairs, Subcommittee on National Parks and Public Lands that involved seven bills, one of which was H.R. 3418. Dale Kelly, who represented AFSA, was the only fishing industry witness. The Committee on Interior and Insular Affairs took no action on H.R. 3418, which effectively killed the bill.557

Though supported by fishing groups and the State of Alaska, the Senate legislation that

would have legalized commercial fishing in Glacier Bay N.P. collapsed in October 1992 over the objections of the Sierra Club, The Wilderness Society, and the National Parks and Conservation Association (NPCA), which had aligned themselves with Democratic Senator Paul Wellstone of Minnesota. A disappointed Senator Murkowski criticized the conservation groups as "enviro-radicals" who had abused the democratic system. ⁵⁵⁸

"Enviro-radical" wasn't an accurate description of these groups. The NPCA, however, was not above distorting the Glacier Bay issue to its own ends. An October 1992 mailing to members stated that "Powerful commercial fishing interests intend to assault the Park's waters with a veritable armada of trawlers."559 The NPCA should have known that trawling had been outlawed in Glacier Bay in 1980. Even if the NPCA actually meant "trollers" where it had written "trawlers," the troll fleet could hardly have been considered an "armada." There were "powerful commercial fishing interests" in Alaska, but few had any interest in Glacier Bay, and none were planning any sort of an assault.

In January 1992, President George H. W. Bush effectively prevented the NPS from moving its proposed rule forward. In his State of the Union address (January 28), the president issued a 90-day moratorium on all new federal regulations "that could hinder [economic] growth."560 The moratorium was later extended four months.⁵⁶¹ Though the moratorium prevented the NPS from publishing the proposed rule, it did not prevent the agency from continuing to work on it. By the end of April 1992, the rule was in its final form, and the agency expected to publish it "as soon as possible" after the expiration of the regulation moratorium.562 Looking to put the best face on the proposed rule, the NPS argued that, absent its adoption, a decision by the court on AWA v. Jensen might force the Service to enforce regulations that would immediately terminate commercial fishing in Glacier Bay.⁵⁶³ The regulation moratorium expired on August 27, 1992, but the proposed rule was not published.

The NPS dearly wanted to publish the proposed rule, but found itself in a quandary because doing so would increase support for legislation by Alaska's congressional delegation that the agency feared would "open the entire Park (except Wilderness waters) to a level of

fishing that could well be detrimental to the integrity of the Park."564 It's conceivable also that the DOI backed off because the Bush administration didn't want to push a controversial rule so close to a presidential election. WWW 565 Additionally, there was a report that negotiations at some point in 1992 between the DOI, State of Alaska, and Alaska's Congressional delegation had nearly arrived at a legislative compromise, but the agreement was ultimately "quashed" by the Hickel administration.566 Speculation and the record aside, by the end of 1992 the proposed rule had gone nowhere, and it was apparent that a final decision would be left to President-elect Bill Clinton's Secretary of the Interior. 567

www The DOI returned the controversial proposed rule to the NPS on January 19, 1993. It was never resurrected.